DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
WASHINGTON, D. C. 20301

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MEMORANDUM FOR Mr. John Harmon
Acting Assistant Attorney General
Department of Justice

FROM Robert T. Andrews
Senior Advisor to the General Counsel

Because of the time constraints*, the Department of Defense has deferred submitting a redraft of the proposed Report to the Special Coordination Committee on "Unauthorized Disclosure of Classified Information". Instead, the DoD comments will address only those portions of the Report in which it takes a somewhat different position.

Investigation and Prosecution Under Current Laws.

The DoD perceives a need to place greater emphasis, in selected leak cases, on prompt and vigorous investigations. Continued failure to investigate the more flagrant disclosures is self-defeating. One impediment in initiating an FBI investigation is the DOJ's insistence that the DoD, as well as other Agencies, agree in advance to declassify the information for purposes of prosecution. While the DOJ must necessarily husband its investigative resources, it addresses the problem solely in terms of its prosecutive interests. On the other hand, the Departments and Agencies whose sensitive information has been leaked, address the problem in terms of their management

* The May 27, 1977 proposed Report was received by DoD on May 31, 1977. It was immediately disseminated for comment to the Military Departments and Defense Agencies concerned with intelligence, investigations and classification, and a meeting scheduled for the following day. At that meeting, substantial revisions and editing of the Report were recommended. However, at the request of the Subcommittee Chairman last evening, DoD is submitting a summary of its position, rather than a rewrite of certain portions of the Report.

interests, i.e., what are the facts behind the leak, what caused the leak, and what corrective management actions are called for. As a consequence, these competing interests often result in a stalemate. Thus, neither law enforcement nor management interests are served.

DoD and ERDA are presently engaged in discussions with the DOJ regarding the requirement for an advance commitment to declassify information about warhead designs, yield and reliability prior to an investigation. The disclosures primarily involve Restricted Data and Formerly Restricted Data, and the only means of resolving the impasse appears to be through direct communication between the Heads of the interested Departments. While this particular matter is not one appropriate for resolution by the Special Coordination Committee, the Committee could direct that appropriate Government-wide guidelines be drawn up which would permit an accommodation of the views expressed above. One suggested remedy would be to authorize the FBI to conduct what is essentially a "civil investigation", as distinguished from a "criminal investigation".

Introduction of New Criminal Legislation.

The DoD components concluded that legislation making it a crime for a Government official to disclose classified information in an unauthorized manner would have a deterring effect, if enacted. It was also noted that the legislation, if properly drawn, would pass constitutional muster.

It has been DoD's experience that the present criminal statutes involve substantial problems of proof (e.g., the Government must show harm to the United States or benefit to a foreign power), and risks of disclosure of classified information during the course of a public trial. Further, it has found that the present laws are not designed for use in security leak cases in which there is no suggestion of deliberate espionage. Consequently, the Government's failure to "utilize the laws now available" does not necessarily lead to the conclusion that no new legislation should be sought.

New legislation, carefully drafted, could eliminate certain though not all of the present areas of concern. However, such a legislative proposal is inalterably linked to the security classification process. Unless the security classification system is policed, and applied

judiciously and with restraint, there is little likelihood of convictions under such a statute. The classification study directed by PRM/NSC-29 of June 1, 1977 represents a proper step in this direction.

Of more immediate importance, however, is whether such a legislative proposal could be enacted by the Congress. Obviously, any new criminal legislative proposal of this nature would stir up immediate Congressional opposition from some quarters, and would involve considerable "political costs" in securing enactment. The Vice President's recommendation that civil, rather than criminal sanctions be pursued, should be considered before electing to introduce a criminal statute. While civil fines would normally require legislation, consideration should be given to including in the Secrecy Agreement prescribed by Section 7 of E.O. 11905, a provision calling for liquidated damages, at least in those instances in which code word material is involved.

Additionally, the Head of Departments and Agencies of the Executive Branch should be reminded of the requirement to "take prompt and stringent administrative action" against security leak offenders. See Section 13(B) of E.O. 11652 and the National Security Council Directive of May 17, 1972 implementing that Order. Unless and until these and other administrative steps are taken, Congress will surely turn a deaf ear to new legislation.

The CIA Memorandum of June 1, 1977 correctly describes the existing state of affairs as a "statutory vacuum", and properly notes the absence in the Report of any discussion of already drafted legislative proposals to impose criminal sanctions for leaks of national secrets. However, unless Congress is motivated to act because of new and startling national security disclosures, it is very unlikely that such legislation will be favorably received.

Use of Secrecy Agreements

Contrary to the representations in the Report, a number of DoD components has required the execution of Secrecy Agreements for a number of years. In some instances, the Agreement is confined to employees having access to intelligence sources and methods; in other versions, it also extends to those having any access to classified information. The components using such agreements include the Office of the Secretary of Defense, the Defense Intelligence Agency,

the National Security Agency, certain intelligence elements of the Military Departments, and employees of certain DoD contractors involved in "special access" programs.

DoD believes that these agreements have educational value and serve as a deterrent. The terms of the Secrecy Agreement previously presented by DoD, and concurred in by DOJ, should be considered for Government-wide adoption. In our view, Section 7 of E.O. 11905, calling for Secrecy Agreements, should not be repealed until such time as E.O. 11652 is repromulgated, at which point this requirement can be incorporated in the Security Classification Order.

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